



UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re: §
CIRCUIT CITY STORES, INC. § CASE NO. 08-35653-KRH-11
Debtor § Chapter 11
§

**TEXAS COMPTROLLER'S OBJECTION TO CONFIRMATION
OF FIRST AMENDED JOINT PLAN OF REORGANIZATION**

The Texas Comptroller of Public Accounts ("Texas Comptroller"), appearing through the Texas Attorney General's Office, objects on the following grounds to confirmation of the First Amended Joint Plan of Reorganization (the "Plan") proposed by the Debtors and Official Committee of Unsecured Creditors.

1. The Texas Comptroller timely filed a proof of claim for \$1,690,627.18 for pre-petition sales-use tax. Based upon tax liens perfected pre-petition against the Debtors' assets in Texas, the claim was filed as a secured claim. The Comptroller believes the claim to be an oversecured claim. To the extent of any shortfall in collateral value (the Comptroller does not believe there is any such shortfall), the claim is entitled to priority treatment pursuant to 11 U.S.C. § 507(a)(8)(C).

2. Additional Texas franchise taxes are due from the Debtors for 2008 and 2009, but the Debtors failed to file required franchise tax returns, so the exact amount of such claims are unknown.

3. As an oversecured creditor, the Texas Comptroller is entitled to (i) post-petition, pre-Effective Date interest under 11 U.S.C. § 506(b), and (ii) post-Effective Date interest for any period during which the Texas Comptroller's secured claim remains unpaid. Plan Art. III. B.1 attempts to deny the Texas Comptroller its statutory right to § 506(b) interest and at the same time unilaterally declare the Texas Comptroller's claim to be unimpaired and deny the Texas Comptroller the right

to vote on the Plan as part of an impaired class.

4. The Plan does not comply with 11 U.S.C. § 506(b) and therefore, under § 1129(a)(1), (2) and (3), cannot be confirmed.

5. Since the Plan proponents failed to properly solicit votes from any oversecured creditors under the incorrect assumption that their claims were unimpaired, the Plan proponents have not complied with § 1126 and § 1129(a)(7) and (8) in the Plan solicitation process. Confirmation must therefore be denied under § 1129(a)(2) and (3).

6. Since Plan Art. III.B.1 fails to provide for post-Effective Date interest on the Texas Comptroller's oversecured claim, and since Plan Art. V.F expressly prohibits the payment of any interest between the Effective Date and the date a claim becomes an Allowed Claim (i.e., during the period any claim objection may be pending), the Plan fails to comply with § 1129(b)(2)(A) and § 511. Those sections require that post-Effective Date interest under applicable non-bankruptcy be paid on allowed secured claims so that they receive present value equal to the amount of such claims.

7. Bankruptcy Code § 362(b)(9) expressly excludes from the automatic stay governmental audits to determine tax liability. The Debtors did business in Texas, both pre- and post-petition, and were required by Texas Tax Code § 111.004 et seq. to cooperate in tax audits that the Texas Comptroller attempted to conduct. Despite multiple requests to conduct a sales-use tax audit for the pre-petition period, the Debtors refused to cooperate. Written notice of such failures and specific requests for cooperation were then made to Debtor's counsel, who ignored such notice and requests, refusing to even respond.

8. Under 28 U.S.C. §§ 959(b) and 960, the Debtors in Possession were required to obey state law, including specifically tax laws, in conducting their business. The Debtors violated §§ 959(b)

and 960 by refusing to obey Texas tax law authorizing audits of the Debtor's books and records and requiring the Debtors in Possession to cooperate with such audits. The Debtors in Possession remain in continuing violation of those statutes, and therefore cannot confirm a plan, pursuant to 11 U.S.C. § 1129(a)(2) and (3), which require that plan proponents comply with applicable provisions of Title 11, be proposed in good faith, and not by any means forbidden by law. The Debtors' illegal failure to comply with tax audits bars them from confirming a plan.

9. Additionally, the Debtors in Possession failed to file Texas corporate franchise tax returns for the years 2008 and 2009 or pay any taxes due for those periods. That also violates 28 U.S.C. §§ 959(b) and 960. Congress specifically amended § 960 in the 2005 BAPCPA amendments to require timely filing of post-petition tax returns and timely payment of post-petition taxes by debtors in possession. The Debtors in Possession violated those provisions, and for that additional reason cannot confirm a plan, pursuant to § 1129(a)(2) and (3).

10. Plan Art. V.H attempts to limit the Texas Comptroller's setoff rights. Under 11 U.S.C. § 553, setoff rights survive bankruptcy and are not affected by other sections of the Bankruptcy Code. IRS v. Luongo (In re Luongo), 259 F.3d 323 (5th Cir. 2001); In re DeLaurentiis Entertainment Group, Inc., 963 F.2d 1269, 1277 (9th Cir. 1992); Pettibone Corp. v. United Staets (In re Pettibone Corp.), 151 B.R. 960, 964 (N.D. Ill. 1993). Further, a confirmation objection is sufficient to preserve setoff rights if a plan attempts to abrogate or limit them. In re Alta+Cast, 2004 WL 484881 (Bankr. D. Del.) The Texas Comptroller objects to any alteration of its setoff rights.

11. Plan Art. VIII.G contains broad exculpation provisions that, if read literally, would excuse parties' non-compliance with applicable statutes, including tax laws. Federal law, as discussed above, requires that debtors in possession and trustees comply with applicable laws in

operating a business under Chapter 11. Nothing in the Bankruptcy Code authorizes bankruptcy courts to exculpate multiple parties from complying with applicable laws, including tax laws, post-confirmation. There is no authority for excusing compliance with the law, and statutory violations, including violations of tax laws, should be excepted from the Plan's exculpation provisions.

12. To the extent, if any, that the Texas Comptroller may hold claims entitled to priority under 11 U.S.C. § 507(a)(8), such claims are entitled, under 11 U.S.C. §§ 1129(a)(9)(C) and 511, to post-Effective Date interest at the rate determined by applicable non-bankruptcy law. (4.25% in Texas during 2009, pursuant to Texas Tax Code § 111.060.) Plan Art. III.A.2 attempts to impose a much-lower "Case Interest Rate". That violates §§ 1129(a)(9)(C) and 511, and the Plan therefore cannot be confirmed under § 1129(a)(1) and (2), which require that a plan and plan proponents comply with all applicable provisions of Title 11. The Plan proponents, represented by experienced bankruptcy counsel, know full well that a low-ball "Case Interest Rate" does not comply with §§ 1129(a)(9)(C) and 511, and they therefore are not proceeding in good faith in attempting to deprive priority tax creditors of their statutory right to interest, in violation of § 1129(a)(3).

Wherefore, the Texas Comptroller requests that confirmation of the Plan be denied and that the Comptroller have such other relief to which it may be entitled.

Respectfully submitted,

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